Koh Chai Kwang *v* Teo Ai Ling (by her next friend, Chua Wee Bee) [2011] SGCA 23

Case Number	: Civil Appeal No 42 of 2010
Decision Date	: 20 May 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Madan Assomull and R Radikamalar d/o Rada Krishnan (Assomull & Partners) for the Appellant; Tang Gee Ni and Chris Chng Chai Leong (G N Tang & Co) for the Respondent.
Parties	: Koh Chai Kwang — Teo Ai Ling (by her next friend, Chua Wee Bee)

Damages – Measure of damages

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 2 SLR 1037.]

20 May 2011 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal against an award of damages made in favour of the Respondent (the Plaintiff in the action) for the injuries suffered by her as a result of a motor accident.

2 On 12 July 2004, along Woodlands Avenue 3, the Appellant's motorcycle collided into the Respondent, who sustained serious injuries. The Respondent was admitted to National University Hospital ("NUH") and warded for 36 days after which she was transferred to Tan Tock Seng Rehabilitation Centre, where she remained for 51 days. She was thereafter given hospitalisation leave from 6 October 2004 until 13 August 2005, a period of more than ten months. By consent, interlocutory judgment was entered at 60% in favour of the Respondent.

3 The Respondent is now blind in the right eye as a result of her injuries. She was diagnosed with left facial weakness and also required surgery to correct hearing loss in her left ear. She also suffered cognitive dysfunction due to her brain injury, which will be the subject of further consideration below.

4 The Respondent had scored 243 for her PSLE and achieved seven "O" level passes (English: B3; Literature in English: C5; Combined Humanities: B4; Mathematics: A2; Additional Mathematics: B3; Chemistry: E8; Higher Chinese: C6). At the time of the accident, she was barely two weeks into her first year as a student of Business Studies at Ngee Ann Polytechnic ("the Polytechnic"). She deferred her studies as a result of the accident, and resumed her education three years later in 2007.

Decisions below

5 The Assistant Registrar ("the AR") awarded general damages of $286,000 on a 100% basis, of which: (1) $70,000 was for the Respondent's physical head injuries; (2) $25,000 was for the Respondent's cognitive disabilities; and (3) $120,000 was for the Respondent's loss of earning capacity ("LEC"). The AR reasoned that as the Respondent was still in school, an award of loss of

future earnings ("LFE"), applying the multiplicand-multiplier formula, would be too speculative. By the time of the assessment of damages before the AR, the Respondent was in the fourth semester of her course for the Diploma of Business Studies ("the Diploma").

6 The Respondent appealed against the AR's decision for an increase in the awards for her physical head injuries and her cognitive disabilities, and for an award of LFE instead of only LEC, or, in the alternative, for the award for LEC to be increased. The Appellant cross-appealed and asked that the total award be reduced to $135,442.47.

7 In *Teo Ai Ling (by her next friend Chua Wee Bee) v Koh Chai Kwang* [2010] SGHC 54 ("the Judgment"), the Judicial Commissioner ("the Judge") allowed the Respondent's appeal in part by: (1) increasing the award for cognitive disabilities to $40,000; and (2) replacing the AR's award for LEC with an award for LFE of $492,000. Costs of the appeals were ordered to be taxed if not agreed.

Issues in this appeal

8 In this appeal, the Appellant challenges both the substantive decisions of the Judge. Accordingly, in this judgment, we will, first, be examining the question of whether this is an appropriate case to award LFE, and if so, whether the quantum accorded by the Judge is reasonable. The second issue which we will consider is whether the sum of $40,000 awarded by the Judge for the Respondent's cognitive disabilities is excessive.

The question of LFE and LEC

9 Recently, this court had the occasion to consider the law on LFE and LEC in the case of *Chai Kang Wei Samuel v Shaw Linda Gillian* [2010] 3 SLR 587 ("*Samuel Chai*"). There, this court clarified that LFE and LEC compensated different losses and, therefore, were not strictly alternative to each other. Citing *Smith v Manchester Corporation* [1974] 1 KIR 1 ("*Smith*"), it accepted the view that LFE referred to the difference between post-accident and pre-accident incomes or rates of income; and LEC addressed the loss arising from the weakening of the plaintiff's competitive position in the open labour market, even though at the time of the assessment of damages the plaintiff was still in employment and did not suffer from any immediate loss of income.

10 As LFE and LEC are distinct and not alternate measures, a plaintiff would bear the burden of providing sufficient evidence for each of these heads of damages if claimed for. At the High Court, the Judge found that the Respondent had established a claim to LFE on the following bases (the Judgment at [54]):

(a) that, but for the accident, it was likely that the Respondent would pass the Polytechnic examinations and graduate with the Diploma;

(b) that, but for the accident, the Respondent would have gone on to attain a monthly gross pay of $1,610 which may reach a maximum of $6,600; and

(c) that, due to her injuries, the Respondent would probably be unable to complete the Polytechnic course.

11 It is, therefore, necessary for us to examine whether there was sufficient evidence for the Judge to have made those findings and, consequently, whether he was justified to hold that the Respondent was entitled to claim for LFE. Specifically, the issues which we would need to consider are these:

(a) whether there was sufficient evidence for the Judge to arrive at his findings:

(i) that the Respondent would have obtained the Diploma but for the injuries suffered from the accident; and

(ii) that she would fail to obtain the Diploma due to the said injuries; and

(b) whether, considering the evidence that was before the court, the multiplicand-multiplier formula used by the Judge to calculate the Respondent's loss was too speculative.

Was it likely that the Respondent, if not for the accident, would have passed the Polytechnic examinations and graduated with the Diploma?

12 On the evidence, it seems to us that there was no real dispute between the parties that the Respondent would likely have passed the Polytechnic examinations and graduated with the Diploma if not for the accident. Let us explain. We note that counsel for the Appellant had cross-examined the Respondent with the intention of showing that she would have passed the Polytechnic examinations *in spite of* her injuries, and this was commented upon by the Judge (the Judgment at [60]). For this appeal, the Appellant even submitted that the Respondent's results showed that she had an equal, if not better, chance of passing the prescribed examinations after the accident. Therefore, we agree with the Judge that the Respondent, if not for the accident, would have graduated with the Diploma, given her academic results in both her PSLE and "O" Level examinations.

Was it likely that the Respondent would have failed the Polytechnic course due to her injuries?

13 For the record, the Respondent's results at the Polytechnic were as follows:

Module	**Credit Unit**	**Grade**	**Attempt**	**Remarks**
Business Communication 1	4	D	1	
Business Statistics	4	F	1	Repeat
Computing & Info Processing	4	C	1	
Creativity and Applied Thinking Skills	2	A	1	
Microeconomics	4	F	1	Repeat
Organisational Behaviour	4	D	1	
Sports and Wellness	2	PX	1	
Business Computing Applications	4	F	1	Repeat
Business Statistics	4	D	2	
Individual and the Community	2	D	1	
Life Management Skills	2	C	1	
Microeconomics	4	D	2	
Business Etiquette & Image	2	B	1	
Business Law	4	F	1	Repeat

Business Management	4	D	1	
Decision Support with Spreadsheets	4	D+	2	
Macroeconomics	4	F	1	Repeat
Principles of Accounting	4	F	1	Repeat
Understanding Relationships: Love & Sexuality	2	C+	1	

14 In a sense, the issue of whether or not it was likely that the Respondent would have failed the Polytechnic course due to her injuries had become academic by the time this appeal came up for hearing before the Judge as the Respondent had already failed to pass the prescribed examinations and would not be accorded the Diploma by the Polytechnic. Indeed, even before the AR rendered his decision, the Respondent sought to admit the fresh evidence that the Polytechnic had just announced that the Respondent had failed to pass the examination and would not be granted the Diploma. The AR refused to admit this fresh evidence on the ground of some other delays on the part of the Respondent and/or her counsel. Before the Judge, objection was taken by the Appellant to any reference to the fact that the Respondent had failed to obtain the Diploma. The argument, which was run by the Appellant before the AR and the Judge, was that notwithstanding the results of the Respondent's examinations for the first four semesters at the Polytechnic, where she failed in a number of subjects, it was nevertheless probable that the Respondent would *pass* the Polytechnic course despite her cognitive disabilities for the following reasons:

(a) the Respondent had a remarkable determination to succeed;

(b) post-injuries, the Respondent had scored an A, a B, and several Cs in her three semesters at the Polytechnic;

(c) the Respondent was able to commute independently, use a handphone and a computer, and attend her classes and examinations;

(d) the Respondent had not sustained permanent disability; and

(e) it was unlikely that the Respondent had suffered or would suffer any deterioration of her intellectual functioning.

15 It seems to us that the question of whether the Respondent had suffered any impairment to her mental and intellectual faculties, which would impede her completing the Diploma course, must be determined in the light of the medical evidence as well as other relevant objective evidence. The points made by the Appellant in the preceding paragraph, other than point (b), are mere arguments and not evidence which would help the court to make a finding on that question. In particular, point (c) adds little as even a ten-year-old child can take public transport, use a handphone, operate a computer and attend classes. The ability to do those things does not show that the Respondent would be able to pass the prescribed examination for the Diploma. In this regard, we ought to mention that it is not true that the Respondent had no trouble in locating her classroom (see [23] below).

(1) Relevant medical evidence

16 The medical evidence in relation to the Respondent's cognitive disabilities came from four experts: Dr Chong Piang Ngok ("Dr Chong"), Dr Lim Yun Chin ("Dr Lim"), and Ms Elizabeth Pang Peck

Hia ("Ms Pang") for the Respondent; and Dr Calvin Fones Soon Leong ("Dr Fones") for the Appellant. We will now briefly address the medical evidence of these four experts.

17 All these experts conducted their examinations of the Respondent in the year 2008, some four years after the accident. Dr Chong conducted one examination on the Respondent on 10 April 2008. Dr Lim conducted a mental state examination on the Respondent in June 2008. Ms Pang examined the Respondent twice on 11 and 14 June 2008. Dr Fones examined the Respondent on 4 August 2008. These experts also had access to medical reports prepared by doctors who had previously treated the Respondent for her injuries ("the Earlier Medical Reports").

(A) Dr Chong

18 Dr Chong was the first of the four experts to examine the Respondent. He is a Consultant Neurologist & Physician with P N Chong Neurology Clinic at Mt Elizabeth Medical Centre. Dr Chong's report was rather straightforward. [note: 1] He simply noted the Respondent's complaints and did an examination of her physical injuries. In cross-examination, Dr Chong conceded that the examination was concluded in 30 minutes. An excerpt of his opinion is as follows:

> I will be very surprise [*sic*] if there are no cognitive deficits following such severe injuries. I am quite sure that there will be some deterioration in her mental capacity. My opinion is based on the nature of the injuries, and the subsequent course of her schooling. However, I strongly suggest that a formal "quantitative" neuropsychological assessment be done.

19 It would seem that Dr Chong's opinion was based essentially on what was stated in the Earlier Medical Reports. He did not subject the Respondent to any tests and only conducted a short interview and physical examination.

(B) Dr Lim

20 Dr Lim is a Consultant in Psychological Medicine at Raffles Hospital. His report dated 2 July 2008 shows that he conducted a mental state examination on the Respondent in June 2008. He made reference to Dr Chong's assessment that the brain injuries were very severe. He also referred the Respondent to Ms Pang for neuropsychological testing and, based on the results that came back, he was of the opinion that there was deterioration of the Respondent's intellectual functioning from her pre-accident state.

(C) Ms Pang

21 Ms Pang is a Consultant Clinical Psychologist with Raffles Counselling Centre, Raffles Hospital. She examined the Respondent twice, on 11 and 14 June 2008. She had access to the Earlier Medical Reports, the Respondent's examination results from the Polytechnic and her primary and secondary school report books, which included assessments of her personality by her teachers. Moreover, Ms Pang also conducted a WAIS-III test (intelligence) and a WMS-III test (memory) on the Respondent.

22 The WAIS-III test revealed that the Respondent was functioning within the Low Average intellectual range, based on her Full Scale Intelligence Quotient. The tests conducted on the Respondent included tests such as Digit Span, Information, Arithmetic, Picture Completion, and Matrix Reasoning. Using the Respondent's pre-accident academic qualifications as a yardstick, Ms Pang opined that the Respondent would have previously functioned within the Average range, and had suffered deterioration in her intellectual functioning as a result of the accident.

23 The WMS-III test results indicated that the Respondent's memory functioning was lower than expected, given her current intellectual functioning (Low Average). Her memory indices, save for one, were within the Extremely Low or Borderline range. The results also suggested that she had difficulty retaining and retrieving information. The Respondent's performance was consistent with her reported difficulty in navigating the campus as she would sometimes be unable to locate classrooms even with the help of a map.

24 In her opinion, Ms Pang did not think that further cognitive improvement was likely given that almost four years had elapsed since the time of the accident.

25 Counsel for the Appellant took pains to cross-examine Ms Pang and Dr Lim on the WAIS-III and WMS-III tests in detail. The Appellant did not raise any issue in the present appeal as to the reliability of the tests or the way in which they were conducted. We share the view of the Judge that Ms Pang had conducted the tests in considerable detail and had ably, in cross-examination, defended the way she carried out the tests.

(D) Dr Fones

26 Dr Fones is a Consultant Psychiatrist practising at Fones Clinic. He was previously the Head of the Department of Psychological Medicine, National University of Singapore and Chief and Senior Consultant Psychiatrist of the Department of Psychological Medicine, NUH.

27 He performed a mental state examination on the Respondent on 4 August 2008. He opined that there was some degree of cognitive deficit, including memory loss, which was expected following the type of brain injury suffered by the Respondent. Having considered the Earlier Medical Reports, he assessed her brain injury as a moderately severe traumatic brain injury. He pointed to her prolonged period of post traumatic amnesia (of more than a month) as a predictor of poorer outcome and residual cognitive deficits. He also agreed that Ms Pang's findings were consistent with his.

(2) Assessing the medical evidence

28 It seems to us that of the four experts, the evidence of Ms Pang was the most comprehensive and reliable. We also note that Dr Fones, the expert for the Appellant, essentially agreed with Ms Pang's evidence.

29 On the evidence, it is quite clear that the Respondent would have difficulty sitting for and passing the examinations required for the Diploma given that she suffers from memory impairment, to the extent that she had difficulty navigating her own school campus. Even the AR, who heard the medical evidence, thought that there was a "real possibility" that the Respondent might fail the Polytechnic examinations leaving her with only her "O" level certificate. Accordingly, we hold that it has been proven that the Respondent would not pass the Polytechnic course as a result of her cognitive impairment. Her ability to remember things is significantly affected. The Appellant relied greatly on the fact that the Respondent obtained an A for one of her subjects. But the fact of the matter is that the Respondent is required to pass all her subjects to obtain the Diploma. Doing well in one subject, which was a non-core subject, is hardly sufficient to show that she could pass all the required examinations to obtain the Diploma.

30 Before moving away from this issue we would like to make this observation. We think, as did the Judge, that it was wrong for the AR not to have admitted the fresh evidence on the Respondent's failure to obtain the Diploma, evidence which was vital to the assessment and which was not evidence that the Respondent could have produced earlier. The argument on this issue, which was

canvassed in disregard of this fresh evidence, was wholly unreal as the Respondent's examination results at the Polytechnic confirmed the views of the medical experts.

Whether the Judge was wrong to have awarded LFE

31 Having decided that the Respondent would likely have failed to acquire the Diploma from the Polytechnic due to the injuries sustained by her from the accident, and having also decided that the Respondent was entitled to damages based on LFE, the Judge adopted the following figures to calculate the multiplicand:

(a) $1,610 (based on the Ministry of Manpower's schedule of monthly gross starting pay of polytechnic graduates in full-time permanent employment in the year 2006 by course: Business Studies); and

(b) $6,600 (the monthly salary of a Grade 1 officer in the civil service holding a polytechnic diploma, according to a letter from the Polytechnic).

The Judge took the difference between $6,600, being the highest salary a diploma holder would get in the civil service, and $1,610, being the starting pay for the average Business Studies diploma holder, and arrived at the mean figure of $4,105. He then took half of $4,105, being $2,050, as the difference between what the Respondent would have earned as a diploma holder and what she would have earned as someone with only "O" level qualifications.

(1) The career model

32 At this juncture, we will make some brief observations on the career model adopted by the Judge, before proceeding to consider whether this is an appropriate case to award LFE.

33 In *Herring v Ministry of Defence* [2004] 1 All ER 44 ("*Herring*"), the plaintiff, who was at the time of the court hearing unemployed, was at the time he was injured pursuing a Higher National Diploma course in law (which he completed despite the accident) with a view to joining the police force. Previously the plaintiff had worked as a qualified sports coach and lifeguard in a leisure centre. Because of the injuries sustained, the plaintiff could no longer join the police force. The court adopted the pay scale of the police force as the career model to determine the plaintiff's LFE. This statement of Potter LJ at [24] of *Herring* is germane:

> In the situation of a young claimant who has not yet been in employment at the time of injury but is still in education or has otherwise not embarked on his career, or (as in this case) one who has taken time out from employment in order to acquire a further qualification for a desired change of direction, it may or may not be appropriate to select a specific career model in his chosen field. In this connection the court will have regard to the claimant's previous performance, expressed intentions and ambitions, the opportunities reasonably open to him and any steps he has already taken to pursue a particular path. In many cases it will not be possible to identify a specific career model and it may be necessary simply to resort to national average earnings figures for persons of the claimant's ability and qualifications in his likely field(s) of activity. In other cases, however, it may be possible with confidence to select a career model appropriate to be used as the multiplicand for calculating loss. In either case, the purpose and function of the exercise is simply to select an appropriate "baseline" for calculation of the claimant's probable future earnings whatever his future occupation may in fact turn out to be. Thus if the career model chosen is based upon a specific occupation (such as the police force in this case), the chance or possibility that the claimant will not in the event enter that occupation or, having done

> so, may leave it, will not be significant if the likelihood is that he will find alternative employment at a similar level of remuneration.

We share the views of Potter LJ, and recognise that in order for the court to make an award for LFE, there has to be some reasonably objective premise for the court to determine the multiplicand. The issue is, therefore, whether such reasonably objective premise is available in the present case.

34 Although the Respondent was not able to produce any more concrete evidence to prove her actual loss other than the scales of salaries applicable in the civil service to those people with a polytechnic business diploma (ranging from $1,500 per month for a Grade 6 officer to $6,600 for a Grade 1 officer), this was clearly understandable as she had yet to commence on any career at the time of the accident. It would be unfair to penalise her for being unable to come up with better evidence in the form of solid figures. In fact, when the Respondent was cross-examined by counsel on the basis that she would eventually obtain the Diploma, she was asked what she could earn in the civil service with that qualification. Further, in the Respondent's affidavit of evidence-in-chief, she had stated the diversity of career opportunities that would have been available to her had she earned the Diploma:

> ... I wish to say that a graduate in Diploma in Business Studies will find job openings in business development, corporate ventures, corporate investments, business management, human resource management, marketing executive, etc.

Therefore, it would appear to us that the civil service provides a reasonable career model to base an award of LFE, where the claimant is a student with a broad range of career opportunities ahead of him or her and it is unclear which career path he or she will eventually take. We do not for a moment say that in every case where the court makes an award of LFE there is no element of speculation. It is obvious that any determination based on future events, as an award of LFE would be, must necessarily involve some degree of speculation: see *Paul v Rendell* (1981) 55 ALJR 371 at 372.

35 As we see it, the only problem in this case which stands in the way of an award of LFE being based on the civil service pay scale for polytechnic diploma holders is the fact that the Respondent had said in court that her intention was to go into the food business. How should the court view this answer? It seems to us that this indication of her preference must be viewed bearing in mind two circumstances. First, she had, as a result of the accident, suffered serious head injuries with significant cognitive impairment. Second, the answer was an indication of her interest in the light of her condition then, when she was someone with only "O" level qualifications. It is of note that she was specifically cross-examined on the point. She said that she still had not decided on the kind of food business she would eventually like to be engaged in. When pressed further, she said that between dealing with food products and selling food, she preferred the latter. We cannot imagine that when the Respondent first embarked on the course at the Polytechnic, she had intended only to sell food in, say, a hawker centre or a food court. We think that it is only fair that her answers be viewed in the context of her cognitive impairment. It stands to reason that no one in his or her right mind would pursue a course in business studies in a polytechnic if all that he or she wanted to do was to set up a food stall to sell food to the public. It would make no sense for that person to receive all that education. Such a person must have intended to do something more ambitious. Looked at objectively, there are numerous possibilities. The Respondent's affidavit of evidence-in-chief, quoted at [34] above, shows that. In any event, going into the food business could mean a wide variety of things, including working in a large food manufacturing company, working in the food and beverage department of a large hospitality establishment, and being in the business of importing and selling food stuff. What is clear is that wanting to be involved in the food business does not necessarily mean setting up a food stall, either entirely on your own or in collaboration with partners. Therefore, unlike

a career in the police force as in *Herring*, the food business is too broad and uncertain a field, and is thus unable to provide a reasonable model for calculating the Respondent's LFE. However, we would emphasise that where a claimant had indicated a clear intention to enter a particular occupation, where there is a strong probability that he would be able to enter that occupation, and where that occupation provides a sufficiently certain career model for the estimation of LFE, the court would adopt that occupation as the appropriate career model instead of adopting the civil service pay scale.

36 In this case, what the Judge in effect did was to use the available evidence and arrive at what he felt was a fair career model. His approach is consistent with the principle in *Herring*, quoted at [33] above, that the possibility that the claimant will not in the event enter the specific occupation chosen in the career model will not be significant if the likelihood is that he or she will find alternative employment *at a similar level of remuneration*. Therefore, the civil service career model ought to be adopted should we decide to award LFE whether now in the present appeal or, if a provisional damages order is considered more appropriate, at a future point in time.

(2) The distinction between LFE and LEC

37 Normally, damages on the basis of LFE are awarded when the injured party is unable to go back to his pre-accident employment and has to take on a lower paying job. In such a case, the loss will be calculated based on a multiplier and a multiplicand, the multiplicand being the monthly loss in pay and the multiplier being the appropriate period over which to compute the loss. In contrast, where the injured party does not suffered an immediate wage reduction (*eg*, due to the compassion of the then employer: see *Smith*) but there is a risk that he may lose that employment at some point in the future and he may, as a result of his injury, be at a disadvantage in getting another job or getting an equally well-paid job in the open market, then the LEC would be the correct basis to compensate him for the loss.

38 However, where the injured party is a young child or a student who has yet to enter the employment market, the situation poses a special challenge. In *Teo Sing Keng & Anor v Sim Ban Kiat* [1994] 1 SLR(R) 340, this court stated at [40] that an award for LEC is *generally* made "where there is no available evidence of the plaintiff's earnings to enable the court to properly calculate future earnings, for example, young children who have no earnings on which to base an assessment for loss of future earnings". But there is nothing in principle which precludes the award of LFE to an injured party who has yet to embark on a career provided that there are sufficient objective facts or evidence to enable the court to reasonably make the assessment. It does not necessarily follow that just because an injured party was still studying at the time the injury was sustained it would not be possible to award him damages based on LFE.

39 There have been a number of cases in the past where damages based on LFE have been awarded to an injured party who has yet to enter the employment market. One example is the case of *Lai Chi Kay and others v Lee Kuo Shin* [1981-1982] SLR(R) 71 ("*Lai Chi Kay*"), which illustrates that not being in employment at the time of the accident is not an impediment to the grant of LFE. There, a fourth year medical student from Hong Kong, who was then studying at the University of Singapore and who could not complete his medical course on account of the injuries sustained by him, was awarded damages for LFE calculated on the basis of the mean between the maximum and minimum salaries in the Hong Kong Medical Service. In this case, the basis for an award of LFE is clear and objective – prior to the accident, the claimant was about to complete a specialised education to enter a specific occupation, *ie* the medical profession; after the accident, he was unable to complete the course and therefore unable to draw the level of salary associated with doctors.

40 In *Tham Yew Heng and another v Chong Toh Cheng* [1983-1984] SLR(R) 782 ("*Tham Yew*

Heng"), the court made an award based on LFE to a nine-year-old boy, whose school performance deteriorated rather badly after the accident such that it was "extremely remote" that he would be able to complete his secondary education. The court took a conservative multiplicand of $200 per month in view of the uncertainties and a multiplier of 20 years.

41 A third case which may be referred to is *Peh Diana and another v Tan Miang Lee* [1991] 1 SLR(R) 22 ("*Diana Peh*"). There, the High Court awarded LFE to a sixteen-year-old student who suffered from permanent disabilities and was unable to continue attending a normal school after the accident. We should clarify that while *Diana Peh* came under review in the later case of *Chang Ah Lek and others v Lim Ah Koon* [1998] 3 SLR(R) 551, this was not in relation to the award of LFE but to the proposition made in *Diana Peh* that the principles governing an appeal from the High Court Judge to the Court of Appeal also applied to an appeal from the Registrar to the High Court.

42 Again, there was a clear basis for awarding LFE in these last two cases – prior to the accident, the claimants were likely to obtain at least "O" level qualifications; after the accident, they had to discontinue school and thus suffered from a reduction of future income. While the quantification exercises in these two cases were admittedly much more uncertain than that in *Lai Chi Kay* as the claimants were of young age and the assessment of LFE was thus necessarily more speculative, it should be borne in mind that a provisional award of LEC was not available as an alternative then as the relevant legislation had not yet been enacted. Otherwise, *Diana Peh* might well have been an appropriate case to award provisional damages, which could be reviewed after five years when the claimant would "probably have reconciled herself with her own physical condition and start to live normally" (*Diana Peh* at [39]). On the other hand, *Tham Yew Heng* might not have been an appropriate case to award provisional damages due to the long period of time that would have had to elapse before clarity could be provided to the claimant's employment prospects, given that the claimant was only nine years old. However, we would leave such a scenario to be considered in an appropriate case in the future.

43 The Appellant has in his Case referred to a number of cases involving students who were injured and who were only awarded LEC, *ie*, *Tan Yu Min Winston v Uni-Fruitveg Pte Ltd* [2008] 4 SLR(R) 825("*Winston Tan*"); *Muhamad Ilyas bin Mirza Abdul Hamid v Kwek Khim Hui* [2004] SGHC 12; *Lim Yuen Li Eugene v Singapore Shuttle Bus Service Pte Ltd* [2005] SGHC 189; and *Clark Jonathan Michael v Lee Khee Chung* [2010] 1 SLR 209. These cases were explained and distinguished by the Judge at [52] of the Judgment. We need say no more on them.

(3) Our determination

44 Here, the injured Respondent had, before the accident, the intellectual capacity to pass seven "O" level subjects and could have gained admission to a junior college but instead chose to enrol in the Polytechnic because she wanted to undertake business studies. The evidence quite clearly suggests that, barring any unforeseen events, the Respondent would have completed the course and obtained the Diploma. Now because of the cognitive injuries sustained by her from the accident, her hope of obtaining the Diploma is forever gone. As stated in [37] above, a plaintiff is typically awarded LEC where he or she continues to be in employment and suffers no immediate loss of income, but would suffer a disadvantage on account of the injury sustained if he or she should lose that current job and have to look for a new job in the open market. As a young child or a student would not have entered the employment market, there can be no immediate loss of income; but to make a *final* award of only LEC on account of the fact that the young child or student has not yet suffered any loss of income is to apply a principle to a set of circumstances to which that principle was never intended to apply. One must not lose sight of the rationale of compensation for a tort committed, especially where the injuries caused to a young person are severe and the consequence to his or her future

employability grim.

45 We recognise that for this purpose there is a distinct difference between, say, a young child of five years old and a student like the Respondent who has completed her "O" levels and has embarked on tertiary education, *ie* a polytechnic course. In the case of a five-year-old child, admittedly it would be difficult to reasonably predict what that child would become. Will he graduate from university and become a doctor, lawyer or engineer? Is medical science able to provide an answer? Fortunately, we are not here concerned with such a child. Here, the Respondent, if not for the accident, would have probably completed the Diploma and started work, whether in the food business or the civil service or any other job. All she has now is her "O" level certificate. Further, there is evidence, and indeed even without such evidence common sense will also tell us, that a polytechnic graduate will command a higher wage than an "O" level holder within most occupations.

46 However, there remain two difficulties to the immediate award of LFE in the present case. Firstly, while the Respondent was said to be earning about $800 a month as a data entry clerk at the time of the hearing of this appeal, it is unclear whether this was only a temporary or transitional arrangement, and it is also unclear what her full scope of career options will be until she has adjusted fully to her injuries. She may well embark on a career path that does not draw a significant distinction between diploma holders and "O" level holders, and thus draw a level of earnings that is comparable to that which she would have obtained with the Diploma. In such a situation, the Respondent may suffer a lower LFE than that estimated by the Judge, or may even not suffer any actual LFE. Therefore, the situation here is distinct from that in *Lai Chi Kay*, where the LFE had clearly crystallised as the claimant was no longer able to embark on his career as a doctor and where it was in fact "highly improbable" that he would ever be gainfully employed.

47 Secondly, the present award for LFE may, on the other hand, amount to under-compensation if the Respondent were to remain in jobs with a pay-scale similar to her present data entry job. While damages are presently assessed upon the assumption that she would be able to hold down jobs with her "O" levels qualifications, her cognitive impairment may be such that she is, in reality, not able to perform to the level expected of an employee with those qualifications. If this were indeed the case, the multiplicand may have to be significantly higher than that determined by the Judge. Therefore, in the light of these uncertainties, the interests of justice may be better served by allowing for a review of damages awarded after a certain number of years when the Respondent's employment situation and prospects become clearer.

48 Ultimately, in all cases involving an award of LFE, the court is to an extent engaged in crystal ball gazing and peering into the future. In the case of a person who is already in employment before he sustained the injury, the element of speculation and uncertainty could be said to be less as compared to a case involving a student like the Respondent here. It was for this reason, and also to enable the court to come to a figure which is even more just, that we suggested, during the course of oral arguments, to the parties that they look into the question of whether this would be an appropriate case for the court to grant provisional damages pursuant to the powers accorded under paragraph 16 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("Paragraph 16").

(4) Provisional damages

49 The previous position in Singapore, as well as in England, was that damages were assessed on a once-and-for-all basis. Paragraph 16, which came into operation on 1 July 1993, provides that the court shall have the "[p]ower to award in any action for damages for personal injuries, provisional damages assessed on the assumption that a *contingency* will not happen and further damages at a

future date if the contingency happens" [emphasis added]. Counsel for the parties took different views as to the term "contingency". The Respondent contended that the contingency must relate to a mental or physical disability of the plaintiff victim whereas the Appellant argued that the term, which is not defined in the Supreme Court of Judicature Act, should be given its ordinary meaning so as to encompass "a multifarious variety of differencing events that may or may not happen at a later point in time". The Appellant asserted that Paragraph 16 confers power on the court to make a provisional damages award "on the basis that a contingency will not happen and keep the door open as it were, for further damages at a future date if the contingency does happen".

50 In this regard, we ought to mention that while Paragraph 16 was modelled after the English provisions enacted in s 32A of the Supreme Court Act 1981 (c 54) (UK), Paragraph 16 is drafted much more widely than the English provisions. The relevant part of the English provision reads:

> 32A – (1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

51 It can be seen that in England awards of provisional damages are limited to the cases where there is a chance that the injured plaintiff will in the future develop some serious disease or suffer some serious deterioration in his or her physical or mental condition. This is unlike Paragraph 16 which is worded more generally. To that extent, we are unable to accept the submission of the Respondent that the contingency must be restricted to a physical or mental condition. Undoubtedly, if the contingency relates to a physical or mental condition (that would be a fact which could be objectively determined), the injured plaintiff may ask for additional damages pursuant to the provisional damages order should the contingency occur. However, there is no reason why the contingency could not relate to some other future fact or circumstance, so long as the occurrence of that fact or circumstance is something which can be objectively determined. For example, if in the present case the Respondent was still pursuing a polytechnic course and has, say, two more years to go, failing to obtain the Diploma could be such a contingency. Indeed this court had previously made a provisional award of LEC based on a non-medical contingency, *ie*, that the claimant's "employment prospects can be shown to be more severely prejudiced than assessed by [the trial judge]" in the unreported decision of *Tan Yu Min Winston v Uni-Fruitveg Pte Ltd*, Civil Appeal No 94 of 2008 (the "*Winston Tan* appeal").

52 However, the difficulty standing in the way of granting provisional damages to the Respondent in this case lies in defining the precise contingency upon which further damages should be awarded. In written submissions, counsel for the Appellant made the suggestion that, adapting the English practice, the court could make an order along the following lines:

> (1) There be judgment for the plaintiff for immediate damages in the sum of _____ on the assumption that the plaintiff would not at a future date suffer a loss of future earnings.
>
> (2) If the plaintiff at a future date does suffer such loss, she shall be entitled to apply for further damages.
>
> (3) Such application shall be made within [specify period].

Counsel for the Appellant further suggested that the "contingency" in this case would be "in relation to [the Respondent's] education and/or employment/business".

53 As far as the Respondent's education is concerned, she has already failed her examinations for the Diploma. It is no longer a contingency. As stated before, if she were still pursuing the Diploma, then her failure to obtain the Diploma could constitute a contingency which would enable her to apply for additional damages. As regards her employment/business, we agree that these matters could logically be formulated as a contingency for this purpose, following the decision in the *Winston Tan* appeal. Provisional damages on the basis of LEC could be awarded at the sum of $120,000 as assessed by the AR, based on this contingency. However, we recognise that in order to avoid future disputes, the contingency must be defined with greater precision than that adopted in the *Winston Tan* appeal.

54 Before proceeding to do so, we would clarify that the provisional award of LEC in the present case is consistent with the holding in *Samuel Chai* at [20] that LFE and LEC are distinct measures and that "in the event that there is a lack of sufficient evidence proving [LFE], this cannot, by itself, convert a claim for [LFE] into a claim for LEC". We are by no means suggesting that the uncertainty over LFE here automatically leads to a provisional award for LEC; instead, we are recognising that, *at the minimum*, the Respondent's competitive position in the labour market is weakened by her failure to obtain the Diploma. The Respondent's LEC has been proven *independently* of the issue of whether her LFE will be proven at the re-assessment.

(A) The window for review

55 Normally, when provisional damages are awarded, a claimant is given the liberty, within a specified period of time from the date of the judgment, to apply for further damages upon the occurrence of a contingency relating to a physical or mental disability. There is obviously a need to adapt this approach where the contingency relates to business or employment. The primary reason for making a provisional award for LEC in such cases is that any immediate award of LFE would be highly speculative and thus it would be appropriate that there be a further assessment at a future date when the claimant's employment situation and prospects become clearer. This period must be of a sufficient duration so that it would achieve the objective of enabling the court to come to a more accurate assessment of the LFE, if any. Moreover, it has also to be of a duration which would act as a disincentive against malingering by the claimant who may seek to remain unemployed or underemployed in anticipation of a further assessment of damages. On the other hand, the period should not be inordinately prolonged in the interest of finality. Accordingly, we think there should be a prescribed minimum period of time that has to elapse before an application for further assessment may be made. Similarly, in order to ensure that this question of further damages is not left open indefinitely, it is also necessary to fix a time period beyond which no application for further damages can be made. At that point, the entire case must come to an end.

56 Taking these considerations into account, we are of the opinion that a minimum period of four years would suffice in the present case to provide clarity on the Respondent's employment situation, and to act as a disincentive for malingering. We are mindful of the fact that the Respondent is presently in her early 20s and starting out on her career, and that the evidence in court shows that she is a determined and ambitious person. In our view, it would not be to her advantage to suffer reduced earnings and put her career on hold for four years in the hope of obtaining further compensation. Instead, we will encourage her to continue to do her best to adjust to her injuries and carry on bravely with life; should her best efforts not be sufficient after four years, the court will then consider her application for further damages.

57 In determining the window period beyond which the Respondent should not be able to make an application for further damages, we are conscious of the Appellant's need for closure. On balance, we think it fair that the outer time limit should be six years from the date of judgment. In short, the

Respondent will have a window period of two years to make her application for re-assessment.

(B) The contingency

58 In defining the precise contingency, we adopt the career model discussed at [34]–[36] above in order to project the likely future income stream of the Respondent but for the accident. Assuming a starting monthly salary of $1,610, a maximum salary of $6,600 at the end of the multiplier period of 20 years, and a constant rate of salary increment, the average compounded rate of salary increment would be 7.3% per annum. Taking the mid-point of the window period for application for further assessment as five years, the Respondent's projected monthly salary at the time of re-assessment is estimated to be $2,290. While these involve relatively uncomplicated computations that could be easily performed by a scientific calculator, the relevant mathematical formulae shall be provided for the avoidance of doubt:

(a) $1610 \times (1 + r)^{20} = 6600$, where r is the average compounded rate of salary increment per annum (in decimals) and is equal to 0.073 when the equation is solved;

(b) $1610 \times (1 + 0.073)^{5} = 2290$.

59 The Respondent will be taken to have suffered LFE should her actual monthly income at the time of her application turn out to be less than 80% of her projected monthly income, *ie* less than $1,832. This 20% discount is applied in order to ensure that an application for re-assessment would be entertained only if the Respondent is significantly prejudiced. Furthermore, the job to which the submitted income applies has to be held by the Respondent for a continuous period of at least six months. Should the Respondent earn more than $1,832 per month at any point of time prior to her existing job at the point of application, she should adduce evidence to explain why she was unable to keep that job or maintain that level of earnings. These two safeguards are introduced to discourage malingering – the Respondent would not be able to obtain further damages by switching to a low paying job just before her application.

60 Should the Respondent be unemployed at the time of her application, she would have to show that she has been unemployed for a continuous period of at least six months and should also adduce evidence, medical or otherwise, to show that she is incapable of holding down a permanent job.

(C) The further assessment

61 If the Respondent is found to meet the above criteria, she should be awarded past loss of earnings for the period leading up to the date of re-assessment and LFE for the remaining period after the re-assessment, with a downward adjustment made for the amount that she would have already received for LEC. Again, we would have to emphasise that this downward adjustment is consistent with the holding in *Samuel Chai* that LEC and LFE are distinct measures – in the present case, the provisional award of LEC and the future award of LFE, if any, are derived from identical compensatory factors, *ie*, the cognitive impairment and the Respondent's failure to obtain the Diploma. In an appropriate case where the provisional award of LEC and the future award of LFE are derived from distinct compensatory factors, no such discount would be necessary. It should also be borne in mind that all these figures would continue to be assessed at 60%, as that is the extent of the Appellant's liability for the accident.

62 The reference monthly salary for past loss of earnings should be based, for the sake of simplicity, upon the mean of $1,610 and $2,290, *ie* $1,950. For example, assuming that the Respondent's re-assessment is heard five years later and that she has earned a total of $48,000 in

that period, the relevant quantum for past loss of earnings would be ($1,950 x 12 5) – $48,000 = $69,000.

63 The reference monthly salary for the LFE should, similarly for the sake of simplicity, be based upon the mean of $2,290 and $6,600, *ie* $4,445. The precise multiplicand would be a matter to be determined at the time of re-assessment based on the evidence as to the Respondent's salary and prospects of salary increment. The relevant multiplier should be the difference between the multiplier decided by the Judge, *ie* 20 years, and the number of years intervening between this judgment and re-assessment. Therefore, following from the earlier example, if the Respondent were earning $800 per month with no realistic prospect of salary increment, the relevant quantum for LFE would be ($4,445 – $800) x 12 x (20 – 5) = $656,100.

64 Based on the example set out in the preceding two paragraphs, the total further compensation due to the Respondent, after adjusting for the provisional award of LEC, would thus be ($69,000 + $656,100 – $120,000) x 60% = $363,060. While it may appear from these figures that our approach of using provisional damages would be even more generous to the Respondent than the immediate award of LFE by the Judge, we would like to note that this would not necessarily be the case, as the example here is based on a worst-case scenario whereby the Respondent earns and is only able to earn $800 per month. Should she turn out to earn marginally less than the threshold amount of $1,832 and enjoy some prospect of salary increment, the total compensation that she would receive would naturally be less than that awarded by the Judge. If she were to recover well and earn beyond the threshold amount, she would not even be entitled to a re-assessment. Therefore, while we acknowledge that the methodology employed here remains an imperfect estimation of the actual loss suffered by the Respondent, what it does is to introduce far greater certainty and accuracy to our crystal ball gazing.

Whether the award for cognitive injuries of $40,000 should be reduced to $25,000

65 We now turn to the second issue of this appeal. The Judge, having taken into account that in *Er Hung Boon v Law Shyan En*, District Court Suit No 1567 of 1997, a sum of $20,000 was awarded for memory impairment and bearing in mind that the Respondent here also suffered a change of personality in addition to memory impairment, thought it only fair that the amount awarded by the AR for this sub-head of injury should be enhanced from $25,000 to $40,000.

66 In the recent case of *Winston Tan*, an award of $90,000 was given for the following disabilities arising out of a head injury:

(a) slowed processing;

(b) impaired memory retrieval;

(c) anger management problem which required treatment with anti-depressants;

(d) significant reduction from estimated pre-morbid status;

(e) below average function in memory and verbal skills;

(f) temperamental changes;

(g) mild intellectual decline;

(h) overall low average performance on all cognitive domains representing significant reduction from estimated pre-morbid status;

(i) problem with higher level planning;

(j) difficulties with learning subjects which require conceptual processing; and

(k) inability to perform tasks beyond simple repetitive jobs.

67 The disabilities suffered by the Respondent, according to the medical experts, were in the main similar to those enumerated in *Winston Tan*. In the present case, the Respondent would obtain a total of $110,000 for her head injuries – $70,000 for the physical injuries and $40,000 for her cognitive disabilities, a sum slightly higher than that awarded in *Winston Tan*.

68 In *Samuel Chai* at [48], the Court of Appeal commented that "sub-itemisation" of what was essentially one single head injury could give rise to over-compensation. In this regard, the risk of overlap should always be borne in mind: see *Akhinur Nashu Kazi v Chong Siak Hong (trading as Hong Hwa Marine Services)* [2009] SGHC 138. What is important to note is that, here, the Respondent has suffered rather significant cognitive disabilities, to the extent that she had difficulties navigating the Polytechnic campus even with the aid of a map. Unlike *Winston Tan*, where the injured party, notwithstanding his head injuries, *continued to complete the polytechnic course with above average grades, the Respondent here failed to graduate*. In this case the AR granted a global sum of $95,000 for the head injuries sustained by the Respondent (including a sum of $25,000 for cognitive disabilities). On account of the sum in respect of cognitive disabilities being raised by the Judge from $25,000 to $40,000, the global sum for the Respondent's head injuries has become $110,000. While on the face of it this sum is higher than the $90,000 granted in *Winston Tan*, we are unable to say that this enhancement renders the global award of $110,000 for the Respondent's head injuries clearly excessive. In the circumstances, we are not minded to disturb the enhancement of the award for cognitive disabilities from $25,000 to $40,000.

Conclusion

69 In the premises, we would substitute the sum awarded by the Judge for LFE by making a provisional damage order on the basis of LEC at the sum assessed by the AR of $120,000. The judgment below is accordingly modified. As the Appellant has failed to have the sum awarded for cognitive impairment reduced and as it was at the suggestion of the court that we have now made a

provisional damage order, we think it is only just that the Appellant should forthwith bear part of the costs of this appeal. We would accordingly grant the Respondent one-third of the costs of this appeal. We will leave it to the re-assessment judge to determine how much of the remaining two-third costs of this appeal (if any) should be granted to the Respondent. Much would have to depend on the outcome of the re-assessment. For example, if at the re-assessment the Respondent is held to be entitled to LFE at a sum no less than the amount awarded by the Judge, then that would be a strong ground to further grant the two-third costs of this appeal to the Respondent. The costs of the re-assessment itself will be for the judge hearing the re-assessment to decide.

70 There will be the usual consequential orders as well as liberty to apply.

[note: 1] ROA 3A 295